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ARTICLES

AN ESSAY ON "TAKINGS"

Matthew Clifford*

Thomas Huff**

Few areas of property law engender as much confusion and controversy as takings law.¹

Federal case law interpreting the Fifth Amendment's prohibition on the taking of private property for a public purpose without just compensation is voluminous and complex.²

INTRODUCTION

Americans often express a deep commitment to the protection of private property. Such expressions are common in both our political rhetoric and our liberal democratic theory. In our legal practice, however, the protection of private property is an

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1. Page Carroccia Dringman, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245, 245 (1994).

2. John L. Horwich & Hertha L. Lund, *Montana Supreme Court Unnecessarily Misconstrues Takings Law*, 55 MONT. L. REV. 455, 459 (1994).

area of marked complexity, controversy, and confusion. The Constitution requires the government to compensate property owners if it "takes" their property.³ But adverse governmental impacts on property are ubiquitous, both because most governmental actions requiring tax revenues affect the distribution of property and because almost every direct government regulation of property affects its value, use, or disposition.⁴ Obviously not all governmental actions that adversely affect property interests constitute compensable takings.⁵ Indeed, the government is said to take property only when the adverse effect "goes too far."⁶ This merely begs the question, however. Deciding what government activity "goes too far" determines exactly what counts as a taking, and effectively decides how the law protects private property.⁷

Few important areas of American law appear as uncertain as takings law. The failure of our legal practice to provide clear principles in the taking area leaves the protection of private property in a state of perennial uncertainty and confusion. Two recent papers in the Montana Law Review acknowledge these difficulties but do little to explain them.⁸ We attempt to offer such an explanation here.

Our thesis can be stated simply. Americans have been unable to agree on clear principles protecting private property, because we disagree over the fundamental reasons private prop-

3. See U.S. CONST. amend. V.

4. See MARGARET JANE RADIN, REINTERPRETING PROPERTY 146 (1993).

5. See *id.* But see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

6. See RADIN, *supra* note 4, at 146. The expression, "goes too far," comes from Justice Holmes' landmark opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

7. See RADIN, *supra* note 4, at 146.

8. See Horwich & Lund, *supra* note 2; Dringman, *supra* note 1. Horwich and Lund never attempt to explain the difficulties in takings law. Indeed, they assert that they will *not* provide a "comprehensive discussion of takings jurisprudence," and that the scope of their comment is limited, "mak[ing] no attempt to summarize or analyze all the federal case law on [the Fifth Amendment's prohibition on uncompensated takings of property]." Horwich & Lund, *supra* note 2, at 455 n.4. They find that the volume and complexity of federal takings jurisprudence "make it risky to provide a summary characterization of the law." *Id.* at 459.

Dringman does attempt to offer a broader analysis of takings law. Indeed, much of her paper addresses the lack of clarity and certainty in state and federal takings law, but she does not offer an explanation for these difficulties. This is because her central, stated purpose is to provide "stricter" and more "concise" takings standards that will "protect and clarify the rights of property owners." Dringman, *supra* note 1, at 246-47. Dringman's analysis of takings law and her proposals are discussed *infra* in notes 50-51 and 113-14.

erty ought to be protected. We ask private property to serve several independent values. When these values conflict in particular cases, it should not be surprising that we lack any principled means of reconciling them. Moreover, our federalist decision-making structure complicates this phenomenon of independent and conflicting values by placing the primary authority for defining property rights and, therefore, balancing the conflicting values, in the hands of the states. The United States Supreme Court's role under the takings clause of the Fifth Amendment to the Constitution is, consequently, far less clear. Should the Court assure that the states have balanced the values correctly under principles of state law, or is the Court expected to reevaluate the balance of values according to independent federal takings standards? The Court, itself, has been unable to decide precisely what its responsibility should be.⁹ We are thus stuck in a confusion of our own making, a confusion we have been unable to resolve through our liberal private property values, our legal doctrines, or our legal structures.¹⁰

We do not pretend in this article to propose a resolution for the difficulties in the takings area. Indeed, it is our belief that takings law will remain governed by uncertain balancing tests and continue to be controversial and highly fact-dependent. Rather, we hope to show that these difficulties have their source in the irreconcilable values that private property serves and in the complexities of our federal structure, and to point out how these values and structures are evident in takings doctrines and cases. We hope, thereby, to relieve some of the confusion in takings law, though not, we expect, much of its uncertainty.

This article has five parts. Part I delineates the fundamental tenets of private property ownership in the classical liberal tradition, and describes the relationship between the general tenets of ownership and the particular ownership rights that persons have in the property law of individual states like Montana. Part II describes, explains, and summarizes the history and doctrines of takings law. Part III analyzes the uncertain relationship between the property rights that flow from individual state law

9. See *infra* text accompanying notes 176-209.

10. See RADIN, *supra* note 4, at 160-61. The best work explaining and evaluating the various property and anti-property arguments, in our opinion, is still LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* (1977) [hereinafter BECKER, *PROPERTY RIGHTS*]. Two useful recent works evaluating the philosophical foundations of property rights are: STEPHEN MUNZER, *A THEORY OF PROPERTY* (1990) and JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988).

and the prohibition on the taking of property without just compensation in the Fifth Amendment to the United States Constitution. Part IV explains how the general justifications for private property rights—the source of the values private property rights serve in our liberal tradition—lead to conflicting conceptions of property rights in state law and to conflicting doctrinal principles in takings law and thus to deeply contested conceptions of property in our common law and constitutional traditions. Part V concludes by showing how the general justifications and the issues of federalism are evident in several Supreme Court takings cases. This part attempts to demonstrate why no resolution of the uncertainty in takings law is possible in the face of our inability to settle both the conflict between the several values which property is said to serve and the venue where those conflicts should be addressed.¹¹

PART I. THE CLASSICAL LIBERAL CONCEPTION OF PRIVATE PROPERTY

By its own terms, the federal Takings Clause protects “private property” from government action.¹² Before we discuss the history or analyze the meaning of the Takings Clause, then, it might be helpful to begin with a brief discussion of what private property means in our legal tradition.

Suppose we found ourselves in the position of explaining to a novice land purchaser what, in general, it means in our legal system to own private property. We might begin, as A. M. Honoré does in his justly famous article on ownership, by describing ownership as “the greatest possible interest in a thing which a mature system of law recognizes.”¹³ Our novice, presumably, would find this a bit vague. We might then, following Honoré, *describe* the standard set of rights which constitute ownership of a thing: the rights to possess it, to use it, to man-

11. This paper will not address federal takings cases from the United States Court of Claims, such as those that arise under the Endangered Species Act, but will rather focus on the far more common cases that arise from state regulation of property.

12. U.S. CONST. amend. V.

13. A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 108 (A.G. Guest ed., 1961) (emphasis omitted). Honoré’s definition, referring as it does to a “mature system of law,” simply describes what ownership means in such a system. Other conceptions of ownership, not of importance to our analysis, can arise in more anarchic situations. See, e.g., Andrew Morriss, *Private Actors & Structural Balance: Militia & the Free Rider Problem in Private Provision of Law*, 58 MONT. L. REV. 115, 138-44 (1997).

age it, to receive income from it, to use it for capital and security, to transmit it to others, and to the absence of terms limiting those rights in the thing.¹⁴ We could call this set of rights the "standard incidents" of property ownership (the famous bundle of sticks from law school). We would have to add that the law limits the standard incidents in certain ways: for example, an owner cannot use property in a manner that harms other owners and may lose property if a judgment is executed against her. We could summarize our description by lumping the incidents of ownership into three broad rights: the rights to possession, use, and disposition.¹⁵ We could then explain what each of these rights entails. For example, Honoré describes the possession right as follows:

The right to possess, viz. to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be put in exclusive control of a thing and the right to remain in control, viz. the claim that others should not without permission interfere.¹⁶

Similar definitions for the rights of use and disposition could be offered.

If our novice is at all astute, she will notice that the standard incidents do not provide a very good description of the way we regard property in modern, everyday life. She might say something like the following: "The standard incidents may describe your *theoretical* incidents of ownership, but when I look at your actual *practice*, I see that these standard incidents are far from absolute. State and local governments qualify each one, either through exercise of their eminent domain or their police powers. Indeed, governments may deny possession altogether if they compensate you, and they may limit uses through their power to prohibit nuisances, to zone in the public's interest, to provide for economic efficiency, to protect the environment, and to guarantee economic and social justice."

We would have to concede that all this is true. We would still insist that the best way to understand ownership of property is to recognize the force of the standard incidents and then to

14. See Honoré, *supra* note 13, at 112-24.

15. See RADIN, *supra* note 4, at 120.

16. Honoré, *supra* note 13, at 113. Note that while the rights are to things, they entail claims against persons.

acknowledge the qualifications that the state places on them. These qualifications include common law rules, land use planning laws and regulations, nuisance laws and regulations, various commercial laws and regulations, taxation laws, and even anti-discriminations laws and regulations.

We could offer some examples. A prominent one would be the law of adverse possession. Although the standard incidents give the owner the right to possess property, in Montana owners can lose this right simply by failing to object within five years to another person's continuous possession of some or all of the property.¹⁷ An owner, similarly, can lose the standard right to exclude other persons by failing to object to their habitual invasion of the property.¹⁸ In both cases, the adverse parties could then claim rights associated with the standard incidents—a claim of title and of an easement, respectively.¹⁹ Other jurisdictions—perhaps in response to different local conditions or customs—have adopted different rules of possession and exclusion. In New York, for instance, a property owner has ten years to object to another's invasion of his or her land.²⁰

A second example of a condition on the standard incidents is the law of nuisance. Although the standard incidents traditionally give a landowner the right to enjoy property free from unreasonable interferences—such as offensive smells—from neighboring property, Montana limits landowners' rights to object to certain activities deemed to be of overriding public value, such as farming operations.²¹ Again, other jurisdictions condition the standard right of enjoyment in other ways. Utah, for example, extends the above exception to certain manufacturing operations.²²

A third example is laws providing public access to waterways. The standard incidents include the right to exclude others. But in Montana, landowners have no right to exclude the public from the portions of their property which lie below the normal high-water mark of streams.²³ In Colorado, landowners do have such a right.²⁴ In Wyoming, they may prevent the public from

17. See MONT. CODE ANN. § 70-19-404 (1997).

18. See MONT. CODE ANN. § 70-19-405 (1997).

19. See MONT. CODE ANN. §§ 70-19-404 to -405 (1997).

20. See N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 1979).

21. See MONT. CODE ANN. § 27-30-101(3) (1997).

22. See UTAH CODE ANN. § 78-38-5(1) (1996).

23. See *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 35-36, 684 P.2d 1088, 1091 (1984); MONT. CODE ANN. §§ 23-2-301 to -322 (1997).

24. See *People v. Emmert*, 597 P.2d 1025, 1030 (Colo. 1979).

wading on the stream bottom, but not from floating over it on the surface of the water.²⁵

We could then conclude our answer to our novice's first questions by saying: "Ownership of private property means what the particular jurisdiction says it means, and owning private property is simply a matter of positive law in that jurisdiction. In American jurisdictions, that positive law generally consists of the standard incidents plus various common law, statutory law, and regulatory schemes. The standard incidents provide a sort of legal baseline against which the laws and regulations determine the precise or actual system of private property ownership."

But, our novice might now ask, "isn't there a principle of constitutional law—in the Takings Clause—that requires the states to compensate landowners in some circumstances when the states change landowners' property rights by changing the state's positive law of property? In short, doesn't this Takings Clause also affect property ownership in our legal tradition?"

Here we would have to answer affirmatively, noting that the Takings Clause has a long and complicated history, a history that our novice should understand before we attempt to explain the Takings Clause and its exact relationship to state positive law.

PART II. THE HISTORY AND DOCTRINES OF "TAKINGS" LAW

A. *The Pre-Civil War Period*

The period between the founding era and the Civil War saw almost no protection of private property from state action in either the United States Supreme Court or the state courts.²⁶ Prior to the adoption of the Fourteenth Amendment, the Supreme Court generally lacked the authority to review state actions, including state property regulations.²⁷ Furthermore, because the federal government "had little need to acquire or regulate land," there were few opportunities to apply the Fifth Amendment to federal action.²⁸ At the same time, state courts

25. See *Day v. Armstrong*, 362 P.2d 137, 151 (Wyo. 1961).

26. See FRED BOSSELMAN ET AL., *THE TAKING ISSUE* 80-81 (1973). This work, written for the Council on Environmental Quality, remains a standard history of the taking issue. See, e.g., *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1056 (1992) (Blackmun, J., dissenting).

27. See *Barron v. Baltimore*, 32 U.S. 243 (1833); *Withers v. Buckley*, 61 U.S. 84 (1857); see also BOSSELMAN, *supra* note 26, at 114-15.

28. BOSSELMAN, *supra* note 26, at 114-15.

generally found compensable takings under state constitutions only when state action either physically appropriated or directly acquired title to land. In fact, during the pre-Civil War period, state courts "were willing to uphold police power regulations even when they left landowners with no feasible use of their land."²⁹

B. *The Post-Civil War Period*

Following the adoption of the Civil War amendments, during the period often called the era of "substantive due process,"³⁰ the Supreme Court began to apply the Takings Clause³¹ to protect private property from state regulation.³² However, "no clear pattern emerged from the Court's early decisions under the taking clause. . . . [Indeed] when the Court was convinced the government's purpose was sound it was willing to uphold government actions despite fairly severe damage to private property."³³

Although the Court provided somewhat more protection after the Civil War than state courts had provided both before and after the Civil War, the Court's protections focused largely on whether the government had permanently and directly encroached on the property.³⁴ Police power regulations—those reflecting the states' broad power to protect the general welfare—were, by definition, not considered takings.³⁵ For example, in *Richmond, Fredricksburg & Potomac Railway Co. v. Richmond*,³⁶ the Court asserted: "The power to govern implies the power to ordain and establish suitable police regulations . . . Appropriate regulation of the use of property is not 'taking' proper-

29. *Id.* at 106.

30. The "substantive due process" era refers roughly to 1890-1930.

31. The Takings Clause was applied through the Fourteenth Amendment's due process clause. In some cases, the Court protected property with the due process clause alone. *See infra* note 57.

32. In particular, the Supreme Court protected property owners against government regulation of commerce. *See, e.g.,* *Chicago, Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226 (1896). The Supreme Court also began to offer some, though not uniform, protection for private landholders against government physical invasions. *See, e.g.,* *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (protecting against physical invasions from dam water).

33. BOSSELMAN, *supra* note 26, at 117; *see also* *Hadacheck v. Sabastian*, 239 U.S. 394 (1915).

34. *See* *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

35. *See* *Mugler v. Kansas*, 123 U.S. 623, 667-68 (1887).

36. 96 U.S. 521 (1877).

ty within the meaning of the constitutional prohibition."³⁷ Meanwhile the state courts continued to find takings only when there had been an "actual appropriation of the property by the taker for the latter's own use."³⁸

An interesting sideline in takings doctrine, particularly pertinent to Montana, developed as a reaction to the general rule that a taking could not occur without direct physical occupation. During the thirty year period following the Civil War, considerable public hostility arose over the effects on private property of the construction of public works. Public improvements, such as changes in road grades and construction of elevated railroads often affected landowners' access easements or easements of light and air.³⁹ Under the direct appropriation rule, landowners could not recover for such injuries when the offending project was located adjacent to their property rather than directly on it.⁴⁰ This concern led to the passage of amendments to many state constitutions, beginning in 1870 in Illinois, providing that "private property could neither be taken, *nor damaged* for public use without just compensation."⁴¹ These "or damaged" clauses specifically targeted the effects of *public works* on private property. Examples included road grade changes that reduced or eliminated accessibility, the building of elevated railroads which blocked light and air, and direct physical injuries like wells drying up due to deep excavation in nearby public works or surface water flooding of land adjacent to public works.⁴²

Montana included the "or damaging" language in Article III, Section 14 of its 1889 constitution. In 1903, the Montana Supreme Court applied this language in *Less v. City of Butte*.⁴³ *Less* was exactly the sort of case that had led to the adoption of the "or damaging" language. The owner of a home adjacent to a street in Butte sued for damages caused by the city's change in

37. *Richmond, Fredricksburg & Potomac Ry. Co.*, 96 U.S. at 528-29.

38. BOSSELMAN, *supra* note 26, at 122.

39. See 2A NICHOLS ON EMINENT DOMAIN § 6.02[2], at 6-33 to -34 (Julius L. Sackman ed., 3d ed. rev. 1997) [hereinafter NICHOLS].

40. See, e.g., *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (finding no taking for disturbance associated with railroad tracks adjacent to the plaintiff's property).

41. NICHOLS, *supra* note 39, § 6.02[1], at 6-30, n.15.

42. See, e.g., NICHOLS, *supra* note 39, § 6.11, at 6-176 (changes in road grade); *id.* § 6.11[2], at 6-180 (easements of light and air); *id.* § 6.08[1], at 6-119 (wells); *id.* at § 6.08[1], at 6-120 to -121 (surface water). See also Robert Kratovil and Frank J. Harrison, Jr., *Eminent Domain — Policy and Concept*, 42 CAL. L. REV. 596, 664 (1954).

43. 28 Mont. 27, 72 P. 140 (1903).

the street grade.⁴⁴ The court carefully distinguished the “taking” from the “or damaging” clauses.⁴⁵ It first noted that the “taking” clause “contemplate[s] the physical taking of property only,”⁴⁶ and then explained the “or damaging” clause:

Under constitutions which provide that property shall not be “taken or damaged” it is universally held that “it is not necessary that there be any physical invasion of the individual’s property for public use to entitle him to compensation.” The owner of a city lot has “a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street.” “These easements are property, protected by the constitution from being taken or damaged without just compensation.”⁴⁷

The court required the city to pay damages for the change in the road grade affecting the homeowner’s access easement.⁴⁸

It is important to note that nothing in *Less* suggests that the “or damaging” clause should be read to protect private property owners from *police power* regulations as opposed to public works projects. None of the ten cases cited by the court for the meaning of the clause addresses police power regulations.⁴⁹ Nor can support for such a proposition be found in the history leading to the adoption of the clause.⁵⁰

44. See *Less*, 28 Mont. at 29, 72 P. at 140.

45. See *id.* at 31-32, 72 P. at 141.

46. *Id.* at 32, 72 P. at 141. The court’s analysis of the Takings Clause is thus consistent with the history of takings law up to 1903.

47. *Id.* (citations omitted).

48. See *id.* at 33-34, 72 P. at 141-42.

49. See *id.* at 32, 72 P. at 141.

50. In a recent comment in the *Montana Law Review*, Page Carroccia Dringman appeared to reach the opposite conclusion and suggested that Montana courts should use the “or damaging” language as justification for a stricter review of police power regulations than federal courts apply under the federal takings clause. Dringman, *supra* note 1, at 259-61, 275. We do not believe the history of the “or damaging” language supports such a reading of the clause. Dringman bases much of her analysis on a 1981 case, *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982), in which the Montana Supreme Court held that the city had taken property through the combined effects of a street widening project and refusal to re-zone some of the adjacent parcels. Dringman ignores the court’s warning that its holding was limited to this peculiar set of facts. See *id.* at 174, 642 P.2d at 146 (“We caution that this holding is limited to the situation here, where a physical taking across the street occurred.”) She also ignores the fact that *Knight*, like *Less*, and other “or damaging” cases, involved public works which hampered access to and enjoyment of adjacent parcels. See *id.* at 169, 174-75, 642 P.2d at 143, 146. Dringman concedes that the Montana Supreme Court only “infrequently invokes” this particular language, “preferring [instead] to concentrate its takings analysis [in police power cases] on federal tests,” but she does not explain why. Dringman, *supra* note 1, at 261. We believe the

C. *The 1920s: Mahon and Regulatory Takings*

Another reason why the "or damaging" language was not construed as support for the idea that police power regulations can "take" property is that by 1922, the Supreme Court, using the Fifth Amendment's Takings Clause and the Fourteenth Amendment's due process clause, had adopted this idea on its own.⁵¹ Indeed, in *Pennsylvania Coal Co. v. Mahon*,⁵² the Court abruptly altered its analysis of police power regulation.⁵³ At issue in *Mahon* was a Pennsylvania statute known as the Kohler Act, which prohibited the mining of coal in such a way as to cause surface subsidence under private homes, public streets, and public buildings.⁵⁴ The purpose of the Act was to protect communities in northeastern Pennsylvania from widespread subsidence caused by the extraordinary increase in the scale of coal mining operations in the first two decades of the twentieth century.⁵⁵ The issue was whether the Kohler Act, by preventing the company from exploiting mineral rights it purchased many years before, took the company's property without just compensation.⁵⁶

Justice Holmes, writing for the Supreme Court, forever altered takings jurisprudence. As we have seen, the Court had previously analyzed property regulation by asking a single question: Is the regulation a valid exercise of the police power? In other words, does it bear a rational relation to protecting the public health, safety, or morals? Where the answer was yes, the Court had always held that the regulation was not a taking. For Holmes, this inquiry did not go far enough. Rather than treating police power regulations as different *in kind* from traditional takings—condemnation and physical invasion—he treated them

explanation is obvious, as we explain in section C.

51. Indeed, this probably explains why the Montana court has only infrequently used the "or damaging" clause. It simply did not need it. Obviously, constitutional clauses can always be interpreted more or less broadly, and courts do not make it a practice to limit their meaning to the specific factual context in which they arise. In the case of the "or damaging" clause, however, the fact is the Montana Supreme Court has not interpreted this language more broadly, and the reason for this, noted here and in the text accompanying this note, seem compelling to us.

52. 260 U.S. 393 (1922).

53. See *Mahon*, 260 U.S. at 412-13. The seminal case from the pre-*Mahon* period is *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the Court found no taking where a brewery became worthless after state statute made manufacture or sale of intoxicating beverages illegal. See also *Hadacheck v. Sabastian*, 239 U.S. 394 (1915).

54. See *Mahon*, 260 U.S. at 412-13.

55. See BOSSELMAN, *supra* note 26, at 127-29.

56. See *Mahon*, 260 U.S. at 412.

merely as different *in degree*:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the . . . due process clause . . . [is] gone. *One fact for consideration in determining such limits is the extent of diminution.* When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.⁵⁷

Holmes then concluded, in *Mahon's* most famous phrase, that the Kohler Act violated the Constitution: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁵⁸

Mahon, then, established a two-tiered analysis for addressing whether a police power regulation is a taking, which can be summarized as follows: 1) Is the regulation within the police power? 2) If so, does the regulation nevertheless go too far, and thus constitute a taking?

Having developed this analysis, the Supreme Court appears to have promptly forgotten it, at least for a time. In the major remaining takings cases of the 1920s, the Court focused solely on the first prong of the analysis, as though *Mahon* had never existed. In *Village of Euclid v. Ambler Realty Co.*,⁵⁹ the Court addressed, for the first time, the general validity of zoning regulation. The Court held that a city zoning ordinance which prohibited any commercial use of the subject property did not, on its face, violate the Fifth Amendment, because it was within the police power: "[T]he [offered] reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."⁶⁰ The Court

57. *Mahon*, 260 U.S. at 413 (emphasis added); see also BOSSELMAN, *supra* note 26, at 139. The *Mahon* Court was typically inartful in distinguishing between the due process and takings clauses during this era. This reflects the influence of the substantive due process analysis exemplified by *Lochner v. New York*, 198 U.S. 45 (1905).

58. *Mahon*, 260 U.S. at 415. (emphasis added).

59. 272 U.S. 365 (1926).

60. *Euclid*, 272 U.S. at 395 (citations omitted). The unfortunate use of the term

did not go on to discuss whether the ordinance, although a valid police power regulation, went so far as to constitute a taking.

Nectow v. City of Cambridge,⁶¹ decided the following year, provided an example of the sort of regulation that the Court would *not* recognize as a valid exercise of the police power. Like *Euclid*, *Nectow* involved the validity of a zoning classification that prohibited commercial use. In *Nectow*, however, the tract in question measured only 29,000 square feet and was surrounded by heavy industry.⁶² Under these facts, the Court was unwilling to say that the ordinance served the stated goals:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.⁶³

Here, of course, the Court can be excused for not discussing the second prong of *Mahon*, because the first prong decided the case.

The same cannot, however, be said of *Miller v. Schoene*,⁶⁴ decided in 1928. *Miller* involved the validity of a Virginia statute which mandated the destruction of the ornamental red cedar trees on the plaintiffs' property.⁶⁵ The purpose of the law was to prevent the spread of cedar rust, a disease which was potentially devastating to the state's apple-growing industry.⁶⁶ The statute did not provide compensation for the loss of the trees, other than reimbursement of the cost of cutting them down, and permission to use the resulting lumber.⁶⁷ The Supreme Court found that the loss of the trees was not a taking.⁶⁸ It reasoned that the power to protect the public interest "is one of the distinguishing characteristics of every exercise of the police power which affects property."⁶⁹ As in *Euclid*, the conclusion that the law was valid under the police power ended the Court's inquiry. The Court did

"substantial" was to create confusion later on. See *infra* notes 109-21 and accompanying text.

61. 277 U.S. 183 (1928).

62. See *Nectow*, 277 U.S. at 186.

63. *Id.* at 188 (using language set forth in *Euclid*, 272 U.S. at 395).

64. 276 U.S. 272 (1928). For a more detailed analysis of *Miller*, see discussion *infra* Part V.

65. See *Miller*, 276 U.S. at 277.

66. See *id.* at 278-79.

67. See *id.* at 277.

68. See *id.* at 280.

69. *Id.* at 279-80.

not go on to discuss whether the regulation, though valid, went too far.

D. The Post-1920s Era

Following this spate of activity in the 1920s, the Supreme Court decided almost no major takings cases until the 1970s. Two exceptions stand out. In 1946, the Court held that the frequent overflights of a home by military aircraft constituted a taking.⁷⁰ The Court likened the overflights to a direct and permanent physical appropriation, since the attendant noise and disturbance were so severe that "[r]espondents are frequently deprived of their sleep and the family has become nervous and frightened."⁷¹

In the 1962 case of *Goldblatt v. Town of Hempstead*,⁷² the Court rejected a challenge to an ordinance that effectively prevented the plaintiff from operating his gravel mining business. In *Goldblatt*, the Court finally applied the long-forgotten two-tiered analysis of *Mahon*, albeit in reverse order: the Court first determined that there was no evidence to indicate that the ordinance lowered the value of the plaintiff's land, and thus "went too far," and then determined that the ordinance was valid as a safety regulation.⁷³

E. The Modern Analysis: Penn Central

In 1978, the Court decided one of its most influential takings cases, *Penn Central Transportation Co. v. New York City*.⁷⁴ *Penn Central* involved the City of New York's decision, under an historic preservation ordinance, to prevent the plaintiff railroad from constructing a major addition to Grand Central Station.⁷⁵ The railroad attacked the decision under both prongs of *Mahon*: It argued both 1) that the designation of the station as a landmark was arbitrary, and therefore beyond the police power,⁷⁶ and 2) that the designation was such a severe restriction on the

70. See *United States v. Causby*, 328 U.S. 256 (1946) (remanding for lower court determination of whether taking was temporary or permanent).

71. *Id.* at 259.

72. 369 U.S. 590 (1962).

73. See *Goldblatt*, 369 U.S. at 594-96.

74. 438 U.S. 104 (1978).

75. See *Penn Central*, 438 U.S. at 104.

76. See *id.* at 132-35.

use of the station that compensation was required.⁷⁷

In addressing these claims, the Court did not seek to announce any grand new principles of takings law. Rather, it endeavored to synthesize its prior cases into a coherent set of rules, and particularly to flesh out the rather vague inquiry it had announced in *Mahon*. It began by noting the difficulty of the task:

[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."⁷⁸

Drawing on its previous cases, the Court identified the significant factors that guide the "essentially ad hoc, factual inquiries" into whether a government action rises to the level of a taking:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.⁷⁹

Applying these factors to the case before it, the Court first concluded that the landmark designation was a valid exercise of the police power.⁸⁰ It noted that the validity of landmark laws was well-established and rejected the argument that the landmark designation was necessarily arbitrary because it burdened certain landowners more than others.⁸¹ Next, addressing whether the designation went too far, the Court noted the regulation did not prevent the railroad from earning a reasonable return on its property, or from making other, less drastic changes to the

77. See *id.* at 130-31.

78. *Id.* at 124 (citations omitted).

79. *Id.* (citations omitted).

80. See *id.* at 138.

81. See *id.* at 131-32.

terminal.⁸² Therefore, the Court concluded, the regulation did not interfere with the railroad's reasonable investment-backed expectations to the degree that it caused a taking.⁸³

F. Post-Penn Central: Building on the Framework

1. Factual Nuances

In subsequent cases, the Court has elaborated on the basic analytical framework it articulated in *Penn Central*, a framework which has come to be known as the "multi-factor balancing test." Some of these cases have involved the application of the *Penn Central* factors to different factual contexts. These cases show that the outcome of the multi-factor analysis depends to a large degree on factual context of the case and the nature of the property interest being asserted. For example, in *PruneYard Shopping Center v. Robins*,⁸⁴ the Court held that a California constitutional provision which required a shopping center to allow political activity on its premises was not a taking.⁸⁵ The plaintiffs argued that the right to exclude others from their property was so essential to the notion of property that its loss necessarily implied a taking.⁸⁶ In rejecting this argument, the Court focused on the fact that the property in question was *commercial*, as opposed to *personal*, and the regulation did not appear to affect the profitability of the enterprise.⁸⁷ In sharp contrast, the Court had found the loss of the right to exclude to be dispositive in the context of *residential* property a year earlier in *Kaiser Aetna v. United States*.⁸⁸

In *Keystone Bituminous Coal Ass'n v. DeBenedictus*,⁸⁹ the Court applied the multi-factor analysis to essentially the same set of facts it had faced in *Mahon*, with a different result. *Keystone* involved the 1966 successor to the Kohler Act, the Bituminous Mine Subsidence and Land Conservation Act.⁹⁰ Although the ultimate goal of the new act was the same—to prevent subsi-

82. See *id.* at 136-37.

83. See *id.* at 137-38.

84. 447 U.S. 74 (1980).

85. See *PruneYard Shopping Ctr.*, 447 U.S. at 88.

86. See *id.* at 82.

87. See *id.* at 83.

88. 444 U.S. 164 (1979). We believe the differing results of these cases can be explained by examining the underlying values at stake in each case. See *infra* Part IV.

89. 480 U.S. 470 (1987).

90. See *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 474.

dence damage—the Court analyzed its practical effects on mining companies quite differently. Here, the Court focused on how much coal the Subsidence Act prevented the companies from mining,⁹¹ a fact that it had ignored in *Mahon*. It found the burden imposed to be slight: the Act deprived the plaintiffs of the right to mine about two percent of the extensive coal deposits that they owned in Pennsylvania and did not prevent them from profitably engaging in their business.⁹² The Court concluded that the Act was not a taking.⁹³

2. Categorical Rules

In some post-*Penn Central* cases, the Court has sought to simplify the second prong of the takings analysis by identifying certain classes of state action that, by definition, go too far. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁹⁴ the Court announced a rule that physical invasions by government are always takings, no matter how trivial they may be.⁹⁵ The "invasion" in question was a half-inch television cable which, with the City of New York's blessing, had been strung across the roof of the plaintiff's apartment building.⁹⁶ The Court held that the plaintiff could not be required to suffer this indignity without compensation, however minimal that compensation might turn out to be.⁹⁷

*Lucas v. South Carolina Coastal Council*⁹⁸ established another categorical rule: regulations which deny all economic use of property are takings. The plaintiff in *Lucas* had bought two beachfront lots with the intention of developing them as homesites.⁹⁹ This intention was frustrated by the Beachfront Management Act, an erosion-control measure which prohibited construction close to the beach.¹⁰⁰ Lucas argued, and the Court agreed, that the Act "took" his property by rendering it economically worthless. The categorical rule announced by the Court might seem unremarkable—after all, regulations that go so far

91. See *id.*, at 496-97.

92. See *id.* at 496-502.

93. See *id.* at 501-02.

94. 458 U.S. 419 (1982).

95. See *Loretto*, 458 U.S. at 426-35.

96. See *id.* at 422.

97. See *id.* at 435-38.

98. 505 U.S. 1003 (1992).

99. See *Lucas*, 505 U.S. at 1006-07.

100. See *id.* at 1007.

as to deny all economic use are by definition extreme, and undoubtedly rare. They would seem to present an easy case under the second tier of the taking inquiry. But the Court found it necessary to concede that in some instances states can legitimately deny all economic use without paying compensation, because the contemplated use constitutes a public nuisance.¹⁰¹ This concession led to an intriguing and (we think) highly revealing discussion of the role of federalism in the takings inquiry.¹⁰² The ultimate holding of *Lucas* was that regulations which deny all economic use are per se takings, unless the prohibition of all use was already implicit in an "objectively reasonable application" of the state's common law of nuisance.¹⁰³

3. Revisions to the First Tier: *Nollan* and *Dolan*

In *Nollan v. California Coastal Commission*,¹⁰⁴ the Court revised the first tier of the takings analysis, which addresses whether the regulation is within the police power. It should be noted, at the outset, that *Nollan* was a so-called "exaction" case; that is, *Nollan* did not involve a general police power regulation, but rather the issuance of an individual land-use permit.¹⁰⁵ *Nollan* thus raises the question of what police power restrictions the government could "exact" from an owner in exchange for issuing a permit.¹⁰⁶

In *Nollan*, the court struck down a requirement that the owner of an oceanfront property grant a public easement along the shore as a condition for the granting of a building permit.¹⁰⁷ It had previously seemed well-settled that the first tier

101. See *id.* at 1030-32.

102. See *id.* at 1028-32. We analyze the relationship between state law and the federal constitution in property regulation, as discussed in *Lucas*, more fully in *infra* Parts III and V.

103. *Id.* at 1032 n.18; see also *id.* at 1031.

104. 483 U.S. 825 (1987).

105. See *Nollan*, 483 U.S. at 828-29.

106. We question the accuracy of the term "exaction" in describing these cases because, as should be evident from the discussion in the text, the word has pejorative connotations whose appropriateness depends entirely on the outcome of a particular case. Exaction implies that a landowner has been forced to give up something to which she had a pre-existing right. But if the conditions sought by the state do no more than offset the public harms that would result from the contemplated use, then it is impossible to say anything has been "exact" from the landowner. To say otherwise would necessarily imply that the landowner has a pre-existing right to use her land in ways that cause public harm, a proposition without legal support. Thus, the use of the term "exaction" begs the question and is therefore unhelpful.

107. See *Nollan*, 483 U.S. at 841-42.

consisted of the highly deferential "rational basis" test the Court uses in equal protection and due process cases. Justice Brennan made this point in his dissent: "It is . . . by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective."¹⁰⁸ This understanding had its roots in the pre-*Mahon* police power cases, originating in *Mugler v. Kansas*.¹⁰⁹ Justice Scalia, however, writing for the majority, seized on the fact that the cases had sometimes used the word "substantial" in describing the first-prong analysis. After *Nollan*, Scalia declared for the majority, the first prong of the taking analysis would require not a mere "rational" relation to a legitimate state interest, but instead a "substantial" relation.¹¹⁰ Justice Scalia also made clear that this standard would not be the same as, or even related to, the standards used in equal protection analysis.¹¹¹ Indeed, it was unclear just what the new standard would require:

Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance the latter." They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.¹¹²

108. *Id.* at 843 (Brennan, J., dissenting) (emphasis in original) (citing *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 466 (1981)).

109. 123 U.S. 623 (1887).

110. *See Nollan*, 483 U.S. at 834. In dissent, Brennan noted that the Court may have varied the language it used, but it did not stray from the basic character of the rational basis test:

Our phraseology may differ slightly from case to case—e.g., regulation must "substantially advance," *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), or be "reasonably necessary to," *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 127 (1978), the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Id. at 843-44 n.1 (Brennan, J., dissenting).

111. *See id.* at 834 n.3 (stating that "our opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims.").

112. *Id.* at 834-35 (citations omitted). The Court's use of the word "substantial" to describe the required nexus can be traced from *Nollan* to *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), to *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), to *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), to *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) and ultimately to *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), where the Court clearly meant to announce nothing more than the traditional rational basis test.

Unfortunately, the facts of *Nollan* would not help the Court shed any light on the issue, because the Court did not appear to think that the permit condition imposed on the plaintiff bore even a rational relationship to the exaction of a beachfront easement.¹¹³

The Court further explained the new "substantial" analysis in *Dolan v. City of Tigard*.¹¹⁴ Like *Nollan*, *Dolan* was an "exaction" case. The plaintiff was the owner of a hardware store who wanted to expand her business.¹¹⁵ As a condition for the necessary permits, the city asked her, among other things, to dedicate a portion of her property lying in the floodplain of a creek for use as a greenway and bicycle path.¹¹⁶ The Court's stated reason in granting certiorari was to clarify the "required degree of connection between the exactions and the projected impact of the pro-

113. *Nollan*, 483 U.S. at 838. Dringman notes, we think correctly, that Justice Scalia's use of the term "substantial" may signal a "movement away from a 'rubber stamp' or superficial application of the rational basis test to a more rigorous standard of review." Dringman, *supra* note 1, at 253. She then goes on to claim that "the Court employed the mid-level tier of constitutional analysis [from equal protection and due process doctrine]." *Id.* at 254 n.56. This second claim does not appear supportable. It not only contradicts Justice Scalia's explicit disclaimer that he was using equal protection, middle tier analysis, but also ignores Scalia's statement that "a broad range of governmental purposes and regulations satisfies these requirements." *Nollan*, 483 U.S. at 834-35.

Dringman then asserts that the Montana Supreme Court "ignored" the significance of *Nollan* in its recent case, *McElwain v. County of Flathead*, 248 Mont. 231, 811 P.2d 1267 (1991). Dringman, *supra* note 1, at 264. In fact, the Montana court was quite explicit both about *its own* standard of review and about the significance of *Nollan*. The court said:

Previous opinions by this Court have applied a standard of reasonableness to the question of whether a taking has occurred when a land-use regulation is imposed through an exercise of police power. We have stated that a regulation adopted through an exercise of police power must be "reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare."

Although "reasonable" is the language this Court has applied to our analysis of taking issues, it is nonetheless a standard of equivalent merit and significance to the federal standard of "substantial." As the United States Supreme Court points out in *Nollan* the standards to be applied to taking challenges are *not* the same standards as those applied to due process or equal protection claims. "Reasonableness" as used in the former situation does not necessarily carry the same distinction from "substantial" as it does when used in the latter situations.

McElwain, 248 Mont. at 235, 811 P.2d at 1269-70 (citations omitted).

114. 512 U.S. 374 (1994). The Court decided *Dolan* just after Dringman's comment was published, and therefore her analysis could not benefit from the Court's elaboration of "substantial" in this case.

115. See *Dolan*, 512 U.S. at 379.

116. See *id.* at 378-81.

posed development."¹¹⁷ The answer, it held, is that there must be a "rough proportionality" between the two, and the burden of showing the "rough proportionality" falls on the government.¹¹⁸ The Court concluded that the city had not met that burden, because the plaintiff was asked to surrender her valuable right to exclude in exchange for an uncertain reduction in traffic congestion.¹¹⁹

It is crucial, we think, to recognize the unique nature of the exaction cases. The *Dolan* Court was careful to draw a distinction between "generally applicable zoning regulations" and "an adjudicative decision to condition [an] application for a building permit on an individual parcel."¹²⁰ It found that the former calls for some deference to the judgment of the legislative branch, while the latter—adjudicative, site-specific permit decisions—does not.¹²¹

G. A Summary of Takings Doctrine

So, we might, at last, say to our novice land purchaser, takings history reveals takings doctrines to be highly complex and indeterminate. We can best illustrate this by summarizing the present content of the Supreme Court's takings doctrine.

Takings analysis requires a two-tier inquiry. The first tier asks whether the government action substantially advances a legitimate governmental interest.¹²² If the government action takes the form of a condition imposed in exchange for a land use permit, "substantially advances" means that the condition must be roughly proportional to the impact of the proposed use.¹²³ If the case involves a generally-applicable regulation, the first-tier test is rather easily met, although perhaps not so easily met as the familiar "rational basis test."¹²⁴

Assuming the governmental action passes the first tier, the second tier of the analysis asks whether the effect of the govern-

117. *Id.* at 386. *But see id.* at 411-13 (Souter, J., dissenting) (arguing that the facts did not present this question).

118. *Id.* at 391.

119. *See id.* at 393.

120. *Id.* at 391 n.8.

121. *See id.* This caveat appears designed to avoid exactly the sort of confusion Dringman engenders by seeking to apply *Nollan's* language to require heightened scrutiny of general police power regulations.

122. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

123. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

124. *See Nollan*, 483 U.S. at 834-35.

ment action is so severe that compensation is required.¹²⁵ In addressing this question, both the economic impact of the action and the character of the action must be considered.¹²⁶ The economic impact inquiry has two parts: (1) the degree to which the action interferes with economic use of the affected parcel; and (2) the degree to which this interference affects reasonable investment-backed expectations.¹²⁷ If the action deprives the parcel in question of all economically beneficial use, and this deprivation could not have been reasonably expected from so-called "background principles" of state property law, the action is a per se taking.¹²⁸ If some economic use of the parcel remains, the action may or may not be a taking.¹²⁹ Turning to the character of the action, if the action can be characterized as a permanent physical invasion, then it is a per se taking.¹³⁰ If the regulation infringes on residential privacy interests, as opposed to commercial interests, it is more likely to be a taking.¹³¹ If it can be characterized as an appropriation of the property for the government's own use, it is more likely to be a taking.¹³² If the benefit from the deprivation is spread widely among the public at large, the action is less likely to be a taking.¹³³

It should now be clear, if nothing else is, that takings doctrine is both complex and indeterminate. Four additional ques-

125. See *Mahon*, 260 U.S. at 415.

126. See *Penn Central*, 438 U.S. at 124

127. See *id.*

128. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-31 (1992). This categorical rule may also apply to economic deprivations which are severe, but less than total. *Id.*; see also *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) (temporary regulatory takings of all use found not different in kind from permanent takings of all use).

129. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 493-502 (1987). Even if the deprivation is nearly total, the action is not a taking if one could reasonably anticipate the possibility of such a deprivation from the relevant law. See *Lucas*, 505 U.S. at 1027-28 (citing *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (ban on sale of bird parts not a taking, due to the state's "traditionally high degree of control over personal property")).

130. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 (1982).

131. See *United States v. Causby*, 328 U.S. 256, 262 (1946). See generally *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (discussed *infra* at text accompanying notes 190-97).

132. See *Causby*, 328 U.S. at 262; *Dolan*, 512 U.S. at 392-96 (demand for dedication of land as public park was a taking, while demand to set land aside as private park, which would provide the same flood control benefits, would perhaps not be a taking). See generally *Penn Central*, 438 U.S. 104.

133. See, e.g., *Keystone*, 480 U.S. at 485-92; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962).

tions might now occur to our novice: First, does the history of takings doctrines and takings law just described mean that the conception of property in the United States Constitution is different in some way from that provided in the systems of positive law in the respective states? Second, how do we know exactly what the positive law requires in various jurisdictions? Third, what are the purposes of these apparently complex systems of private property ownership? Fourth, how do these purposes shape both the positive law of individual jurisdictions and the constitutional prohibition on uncompensated takings? Parts III, IV, and V attempt to answer, respectively, the first two and then the third and fourth of these questions.

PART III. PROPERTY IN POSITIVE AND CONSTITUTIONAL LAW

When does a constitutionally prohibited uncompensated taking occur? First, "no constitutionally significant taking of property can occur unless some government in some way *perpetuates a departure from some then-existent body of law*, upon which the complaining party might appropriately have relied as securing to him or her some property-based advantage."¹³⁴ The phrase "then-existent body of law" refers to the common law, statutory law, and regulations which qualify and affirm the baseline incidents of property ownership in the several states.¹³⁵ Before we can determine, using the two-tier analysis, whether a governmental action has "taken" an advantage secured by this body of state positive law, we must know exactly what advantages that body of law secures. But the federal nature of our political structure complicates this analysis. Who, our novice might ask, decides what advantages are secured by state law? Does the United States Supreme Court decide what state property law advantages are in place at the time of the government action alleged to be a taking, or is that decision a matter for state courts?¹³⁶

We might respond that property interests are defined by

134. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 309 (1993) (emphasis in original).

135. *Id.* at 310.

136. These questions provide the focus of Professor Michelman's article. See *id.* Indeed, Michelman is particularly interested in the dilemma this issue creates for conservatives like Justice Scalia. To protect property interests, the Court must retain the authority to decide state property law issues; however, to protect federalism, the Court must leave the authority to decide state property law with state courts.

state law and are, thus, a matter for state courts. State courts are the authoritative voice on the issue of what interests are secured for property owners at any particular time. We could go on to explain the source of this authority in the federalism provided in our constitutional scheme and, to give a truly complete answer, the theory of the allocation of powers that our federalism is meant to accomplish.¹³⁷ But, to be fair to our novice, we would want to point out that this answer raises much deeper and more controversial jurisprudential questions. For example, exactly how are state courts to decide what interests are secured by state property law at a particular moment? Moreover, must the United States Supreme Court accept just any state court construction of state property law, or does the federal Takings Clause place some sort of limits on acceptable interpretations?¹³⁸

Perhaps an example would help. Suppose someone is considering the purchase of a large tract of land in the Flathead Valley. This purchaser came from out of state, and, as a prudent land purchaser, consults an attorney to ask what restrictions apply to the use and development of land in the Flathead Valley. The attorney might give four answers, assuming that the purchaser already understood the standard incidents of property ownership. First, state nuisance law and land use regulations prohibit uses which harm others. Second, land use regulations protect the public interest in orderly development. These include various types of zoning and planning regulations and related permit procedures. Here it would be possible for the attorney to explain just what regulations now apply to the specific piece of property being considered for purchase. Third, a sophisticated attorney would also want to caution our hypothetical Flathead Valley land purchaser that some restrictions may also follow from the background principles of Montana's general property law.¹³⁹ Fourth, the attorney would warn of impending changes in the statutory or regulatory schemes revealed in contemporary and predictable political activity. For example, a recent spate of development in what had been a relatively unpopulated area might well signal an impending increase in land-use regulation, as might increasing public awareness of the environmental ef-

137. See *id.* at 302-03.

138. See *id.* at 314. This is the focus of a disagreement between Justices Scalia and Blackmun in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), discussed *infra* in note 143.

139. See *Lucas*, 505 U.S. at 1031-32.

fects of development.¹⁴⁰

In sum, the property interest which a prospective purchaser receives in exchange for her money includes restrictions on uses prescribed by the existing rules, restrictions which might follow from the background principles and understandings of the relevant state law, and impending changes in restrictions. Those "rules, principles, and understandings" will always be subject to the vicissitudes of the Montana Supreme Court's interpretations of their meaning, their practical application, and their consistency with state and federal constitutional principles. Our attorney will add that it is difficult to predict, at the margins, exactly what the Montana Supreme Court might do with any particular case. However, reasonably accurate predictions are possible in many cases.

To return then to the question with which we began this section: "When does a constitutionally prohibited, uncompensated taking occur?" Our lawyer can now respond by saying that uncompensated takings typically do *not* occur when government restrictions on property present in the state law's "existing rules and background principles and understandings" are in force. Such existing rules, principles, and understandings already qualify property ownership, already inhere in the meaning of property in the particular jurisdiction, and already affect the market value of property. Thus, common law interpretations of property, or statutory schemes which merely implement the existing rules, principles, and understandings, would not be compensable takings. This means that:

questions about the content and meaning of historical state property law are potentially in issue every time someone complains in court that a state government has violated the Federal Constitution by taking property without paying for it. If a taking of property can occur only when a government in some way perpetuates a departure from the then-existing body of property law, then in order to tell whether a given state action takes property you have to know what the State's property law as a matter of fact is—what that law as a matter of fact says—at the moment when the action complained of takes

140. It is our guess that most land purchasers in Montana do not have lawyers and, therefore, do not have good information regarding future land-use regulation, nor would they be likely to be able to cheaply obtain the kind of information described in this paragraph. Though beyond the scope of this paper, it would be interesting to study the extent to which uncertainties regarding present and future regulation are discounted in the price of property.

place.¹⁴¹

But, herein lies the special complexity of our federalist decision-making structure. The United States Supreme Court, under the Takings Clause, may review state supreme court decisions upholding state regulations of property. The question that inevitably arises for the Court in its review, is the extent to which the Court can or should question the state supreme court's construction of its own state's property law. In *Lucas*, the Court looked to the South Carolina Supreme Court to determine what limitations already "inhere in . . . the restrictions that background principles of the State's law of property and nuisance . . . place upon land ownership,"¹⁴² and the Court said it would examine the state court's decision to determine if it was an "objectively reasonable" application of the state's law.¹⁴³ This means the state court's construction of that state's property law is never final, because it is always subject to review by the Supreme Court as an "objectively reasonable" construction of the rules and background principles and understandings of its law.

But, to complicate this matter further, the Supreme Court has not deferred to "objectively reasonable" state court constructions of state practices in cases involving adjudicative decisions conditioning building permits on the exaction of property interests.¹⁴⁴ The Court, rather, applies its own "rough proportionality" standard to such cases, thus narrowing its deference to state courts, and its respect for federalism, to cases involving generally applicable regulations.¹⁴⁵

141. Michelman, *supra* note 134, at 310.

142. *Lucas*, 505 U.S. at 1029.

143. Michelman, *supra* note 134, at 314 (citing *Lucas*, 505 U.S. at 1032 n.18). Justices Scalia and Blackmun focus on the difficulties raised by this issue in *Lucas*, 505 U.S. at 1032 n.18, and 1054-55, respectively. As the Court remanded the State's zoning regulation (which had eliminated, arguably, all the plaintiff's economically valuable use) to state court for determination of whether it was implicit state common law nuisance principles, Justice Blackmun, in dissent, worried that "[t]here is simply no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly 'objective' or 'value free'." *Id.* at 1055. In response, Justice Scalia argued: "There is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Id.* at 1032 n.18 (emphasis added).

144. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

145. See *supra* text accompanying notes 114-21.

Finally, if new statutes or regulations stray too far beyond the background principles and understandings, a taking may also have occurred. Again, state courts would interpret the new rules and decide the reach of the background principles and understandings,¹⁴⁶ and state courts and ultimately the United States Supreme Court would decide whether a new regulation, which goes beyond the existing background principles and understandings, has gone too far and is, therefore, a compensable taking.

Consider, again, the example of our hypothetical Flathead Valley land purchaser. Suppose part of the land our purchaser is planning to purchase is on the Flathead River near Bigfork.¹⁴⁷ Suppose, also, that nothing in current rules or regulations specifically prohibits building a single family dwelling near the river on this piece of land. However, as our wise lawyer has warned our hypothetical land purchaser, all land development in Montana is understood to be subject to the reasonable exercise of the state's police power. In particular, the Montana Supreme Court has stated that changes in the rules governing land use are acceptable if they are "substantially related to the legitimate State interest in protecting the health, safety, morals, or general welfare of the public."¹⁴⁸ In other words, the regulation must fall within, and be substantially related to, the purposes of the state's police powers, and, the Montana Supreme Court has added that the rules must use "the least restrictive means necessary to achieve [these police power ends] without denying the owner economically viable use of his or her land."¹⁴⁹ In effect, our prospective land purchaser must understand that future development on the land she might purchase may be limited as the state determines necessary to protect the public interest, provided the "substantially related" and "least restrictive means" standards are met, and provided that all economically viable use is not denied.

Thus new regulations following from background principles

146. The state courts would also want to consider any special provisions of the state constitution that might provide adequate and independent state grounds for the protection of private property from adverse governmental actions. See discussion of "or damaging" language in the Montana Constitution, *supra* text accompanying notes 39-50.

147. This example is based roughly on *McElwain v. County of Flathead*, 248 Mont. 231, 811 P.2d 1267 (1991).

148. *Id.* at 235; 811 P.2d at 1270. The U.S. Supreme Court has applied a similar standard under its first-tier analysis. See *supra* text accompanying notes 52-69.

149. *McElwain*, 248 Mont. at 235; 811 P.2d at 1270.

and understandings qualify property ownership in Montana as surely as do existing, specific land-development rules and regulations. Changes in what the background principles and understandings will allow, in *new* circumstances, will inevitably reflect changing social and environmental conditions. In the context of urban zoning, the United States Supreme Court expressly acknowledged the effect of changing conditions on the applications of the background principles to property as long ago as 1926:

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom and necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.¹⁵⁰

But how, exactly, do we predict just what those background principles and understandings will allow in the future, given changing circumstances? Of course, a shrewd lawyer will consider just what those background principles and understandings have permitted in the past, and how the Montana Supreme Court and the United States Supreme Court have construed such principles. Obviously, differences in the background principles and understandings in different states will, in turn, be reflected in different common law rules and different statutory and regulatory schemes in those states.

We believe that predicting when the courts will find a new regulation goes too far beyond the background principles and understandings of state property law, requires an understanding of the political and moral values these principles and understandings serve. The more that we know about *why* our society thinks it is important to protect certain property interests, the

150. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

better we will be able to predict the concrete form that such protection will take in specific cases. This is where the underlying conflict in values becomes most apparent.

PART IV. THE PHILOSOPHICAL JUSTIFICATIONS FOR PROPERTY RIGHTS IN AMERICAN LAW

Suppose, to extend our metaphor, that our Flathead Valley attorney studied the moral basis of property rights before deciding to attend law school. She might then explain to our prospective land purchaser that in our constitutional and common law traditions, private property is said to rest, at least in part, on all of three "general" justifications:¹⁵¹ The general welfare or utility justification, the labor or economic justice justification, and the self-expression or personal liberty justification.¹⁵² These three general justifications, unfortunately, lead to an intractable and profound "coordination" problem—what are we to do when the justifications produce conflicting results in particular cases?¹⁵³

151. Becker contrasts general, specific, and particular justifications as follows: "[G]eneral justification: Why should there be any property rights at all — ever? . . . [S]pecific justification: Given that there should be property rights of some kind, what kind(s) should there be? . . . [P]articular justification: Given that a specific kind of property is justifiable, who, in particular, should have title to existing pieces of it?" Lawrence Becker, *The Moral Basis of Property Rights*, in NOMOS XXII: PROPERTY 187, 187 (J. Roland Pennock & John W. Chapman eds., 1980) [hereinafter Becker, *Moral Basis*]. Becker also notes the distinction between "natural" rights to property, "said to 'occur naturally,' and "positivistic" rights to property "which arise from human institutions." BECKER, PROPERTY RIGHTS, *supra* note 10, at 16. The "natural rights to property" tradition, prevalent at the time of the framing of the Constitution and particularly influential during the Gilded Age and the *Lochner* era, was replaced during the New Deal era and by the Warren Court with a more positivistic conception of property. See Michelman, *supra* note 131, at 307. Both of these conceptions of property, which speak to the ultimate sources of law, are themselves developed and applied in terms of the three general justifications discussed in this section. For example, John Locke's famous conception of the natural right to property analyzes property primarily in terms of the "labor" general justification. See John Locke, THE SECOND TREATISE ON GOVERNMENT ¶ 27 (Thomas P. Peardon ed. 1952).

152. See BECKER, MORAL BASIS, at 193-94. Becker describes four conceptually sound, independent lines of justification from the philosophical literature. We believe that truncated versions of three of those lines of justification appear in takings law.

153. Becker notes, and we agree, that because these general justifications are essentially independent and of presumptively equal weight no strategy yields a priority solution, leaving us with an intractable coordination problem. See *id.* at 194-95. There are also at least three other general justifications not typically present in takings law, viz., first occupancy, conquest, and the Lockean version of the labor justification. First occupancy and conquest arguments often turn up in early land claims cases. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). For a discussion of first occupancy and Lockean labor arguments see BECKER, PROPERTY

Our prospective land purchaser, a bit overwhelmed by these arguments, asks for a detailed explanation of the three general justifications. Our lawyer suggests that these explanations might make more sense if she, first, discussed some examples of these lines of justification and the "coordination" problem.¹⁵⁴

Suppose lobbyists for several environmental groups ask your state legislature to protect the lakes and rivers in your state from increasing development.¹⁵⁵ The state legislature responds by enacting a comprehensive shoreline zoning statute. This statute, which requires that individual counties in your state enact county-wide shoreline zoning, prohibits, *inter alia*, filling wetlands within 1000 feet of lakes without a county permit. The state statute is founded on scientific evidence that changing wetlands adjacent to lakes upsets the natural environment of those lakes by altering their aquatic life and thus their ecosystems. After your state legislature enacts this policy scheme, your county zoning officer denies a permit to landowners who planned to build a long-awaited retirement home along a favorite lake. The landowners may still build a home on their property, but the home must be 1000 feet from the lake. The landowners sue, claiming a taking of private property without just compensation. The lower courts deny their claim.¹⁵⁶ The case goes to the United States Supreme Court.

The state argues to the Court that it is perfectly within the authority of the state, under its police powers, to maximize the general welfare of its citizens, to promote economic efficiency, thus to maximize social utility. Moreover, the state argues, this pursuit of the general welfare in the state's regulation of private property is one of the background principles and understandings of this, and every, state's property law. In short, the state makes the argument that private property rights are both justified by their social utility and limited by their social disutility. The right to build adjacent to the lakes, by filling wetlands, is worth a fraction of the value of the lakes to the state's citizens. No one owns property without recognizing that the state's police power,

RIGHTS, *supra* note 10, at 24-31, 32-52.

154. For the detailed discussion of the three general justifications, see *infra* text accompanying notes 148-61.

155. This example is based roughly on *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

156. Typically the state supreme court finds no taking under the federal constitution. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

when exercised to prevent social costs, may limit the property's use.

The landowners make two counterarguments to the Court. First, they argue that their land has economic value which is a part of their justly earned wealth. The purchase price of their property, with lake access and lake views, reflected the landowners' expectations for development that they believed, and the sellers believed, were available prior to the enactment of this ordinance. The landowners expended their justly earned savings on the purchase of the property. Protection of this wealth is also one of the background principles and understandings of this state's private property system. This statute, limiting the development on this property, is, effectively, an unexpected and therefore unfair theft of the landowner's wealth.

The landowners argue, second, that the state is ignoring the important and irreplaceable opportunities for self-expression of the landowners also found in the background principles and understandings which are secured by private property. The landowners in this particular case have planned for years to build their retirement home on the lake; and they are now denied this important opportunity to spend the closing years of their lives enjoying the amenities of their lakeshore property. Thus if the Court denies the landowners the opportunity to build along the lake, the landowners lose their liberty of self-expression in their property, and the autonomy to fulfill the plans they have made for their lives.

The United States Supreme Court now faces a problem. Which of these three values: (1) the social utility values expressed in the statute protecting the ecology of the lakes raised by the state, or (2) the economic justice values or (3) the liberty of self-expression values raised by the landowners, *when balanced against each other*, best expresses the balance of values implicit in the background principles and understandings of the property law of the state which passed this statute?¹⁵⁷ Put another way, should the lakefront landowners have recognized that their development rights were always vulnerable to the social utility balancing which the legislature did when it enacted this statute? If so, the statute is not a taking of property without just compensation.

157. This assumes that the Court does not bring a balance of values independent of the state's balance of those values. The controversies surrounding this assumption are discussed *infra* text accompanying notes 205-09.

This presents the ultimate problem in takings law: To understand what you own, you must know: (1) the traditional incidents of property ownership—possession, use, and disposition, plus (2) the traditional common law limitations on property ownership—e.g., eminent domain and judgment execution powers of government, and common law nuisance principles, plus (3) the various existing rules and regulations governing property promulgated by the legislature and the executive branch, plus (4) the background principles and understandings governing the state's future exercise of its police powers, plus (5) the balance of the three competing, underlying values as they are expressed in the law of the state in which this land purchase is to occur, and (6) the United States Supreme Court's evaluation of the balance of those sets of values as comporting with, or as exceeding, the background principles and understandings.¹⁵⁸

"But," our purchaser might ask, "how can you possibly reconcile three independent values which serve as the foundation for private property, when there is no clear principle coordinating those values? I would think that you would have to engage in some sort of 'highly non-formal, open ended, multi-factor balancing effort.'"¹⁵⁹

But, our lawyer might respond, this is not quite as difficult as it might seem. The outcomes of takings cases will reflect, at bottom, the balancing of the three general justifications for property mentioned above. To understand the "taking" issue, then, we need to understand the character and independence of these three lines of justification.

The first, and most common justification for property (and therefore, of government regulation of property) is the *general welfare justification*. Philosophers typically describe these kinds of justifications as "utilitarian."

Human happiness is an important human good. Achieving human happiness requires that persons be able to "acquire, possess, use, and consume things."¹⁶⁰ Security in the acquisition, possession, and use of property which is necessary to provide the happiness which property can bring, requires a system of property rights.¹⁶¹ Because the achievement of human happiness is the only value here, all limitations on the acquisition, possession,

158. See *supra* text accompanying notes 114-21.

159. See Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1621 (1988).

160. BECKER, PROPERTY RIGHTS, *supra* note 10, at 58.

161. See *id.*

use, and consumption of property in the utilitarian property rights system must be justified by their contribution to the net sum of human happiness. The system of property which results from this utility balancing will be said to maximize utility. Typically these arguments appeal to the state's authority under the police power to pursue the health, safety, and general welfare of the public. These arguments often include a substantial "market capitalism" component, viz., capitalism promotes the creation of wealth which promotes human happiness, and capitalism requires a system of private property rights.

One interesting species of this kind of justification, which integrates police power regulations with market considerations, seeks regulations which promote economic efficiency.¹⁶² This form of the argument asserts that "property rights should be defined so as to best approximate, in operation, the idealized free market model of efficiency in allocation."¹⁶³ Limits on rights found in "liability rules, restrictions in use, transferability, transmissibility, possession, income, or the rest of the elements of full ownership [i.e., the liberal incidents of ownership] must be evaluated for [their] ability to move things toward [efficiency]."¹⁶⁴ The advantage of the economic version of police power regulation is said to be its ability to better measure utility (in economic terms with price, for example), but the general welfare justification and the economic justification are fundamentally the same. They see property ownership in instrumental terms, and they seek, in the system of property ownership, maximum human happiness.

The second most common general justification for property is the *labor or economic justice* justification. The basic idea here is familiar, widely accepted, and commonly asserted.¹⁶⁵ Producers deserve the fruits of their labors.¹⁶⁶ The system of property rights is justified because it guarantees to the producer the appropriate protections for the production accomplished by his or her efforts. The best version of this argument¹⁶⁷ makes a relatively modest claim, namely that "[i]t is not so much that the

162. See generally, Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); see also Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

163. BECKER, PROPERTY RIGHTS, *supra* note 10, at 71.

164. *Id.* at 71.

165. See *id.* at 41.

166. See *id.*

167. This argument is traditionally associated with John Locke and John Stuart Mill.

producers *deserve* the produce of their labors. It is rather that no one else does, and it is not wrong for the laborer to have them."¹⁶⁸ The rhetoric of this argument finds its roots in the "work ethic"—in the idea that the virtue of industry deserves reward. In law, the argument is typically taken to be a fundamental principle of fairness.¹⁶⁹ Accordingly, it is simply not fair, not economically just, to take the economic worth of the product of labor without sufficient justification.¹⁷⁰

The third general line of justification characteristically at work in the law of takings is the *self-expression or personal liberty* justification. This justification focuses on the material elements of our "other" liberties, what John Rawls calls the economic worth of liberties.¹⁷¹ This justification can best be seen historically. The great advance which the system of private property brought in the seventeenth century was to allow persons the material means to carry out their lives. When the lord of the manor owned everything, the serfs' lives were entirely at the mercy of the lord.¹⁷² The emerging system of private ownership thus provided the material means for persons to exercise their liberties.¹⁷³

Two versions of this justification seem present, though undifferentiated, in American law. The first connects property ownership to other important liberties like those protected by the rights to speech, privacy, and association.¹⁷⁴ Typically the law allows the property owner to use the property in ways that support other liberties. The other version focuses on the intrinsic importance of property to self-expression. This version of the personal liberty argument¹⁷⁵ focuses on the importance of mate-

168. BECKER, PROPERTY RIGHTS, *supra* note 10, at 41.

169. See *id.* at 48. Complex qualifications in the philosophical literature on this justification make it seem weak. For example, Becker suggests that the labor that produces the property claim must be beyond what is required morally of others, and produces something that would not have existed except for the labor. Moreover, the product must be something from which it is not wrong to exclude others. See *id.* at 41-56. Nonetheless, takings law treats this justification as if it were fundamental and unqualified.

170. This argument carries the greatest weight in takings law the more personal and less commercial the property in question. See *supra* notes 130-33 and accompanying text.

171. See JOHN RAWLS, A THEORY OF JUSTICE, 204-05 (1971).

172. See Charles Reich, *The New Property*, 73 YALE L.J. 733, 770-72 (1964).

173. See *id.*

174. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1976), discussed *infra* in text accompanying notes 190-97. But see *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1973).

175. This argument is traditionally associated with G.W.F. Hegel, *Philosophy of* <https://scholarworks.umt.edu/mlr/vol59/iss1/3>

rial things to the development of human personality. To develop their personality, persons need things in which to express that personality. The idea of the private home, for example, reflecting one's personality in its design and its decoration, captures well this version of the self-expression argument.

To understand the operation and concrete force of these three general justifications in takings law, and to realize the difficulty we have harmonizing their respective claims, we rely upon on several old and recent Supreme Court takings cases to conclude our analysis.

PART V. THE SUPREME COURT'S DECISIONS IN PHILOSOPHICAL CONTEXT

In the preceding two sections, we have attempted to explain why the takings inquiry is so complicated. We have seen that the heart of the inquiry involves a sort of "judgment call" about whether a government action goes beyond what a property owner could have expected from an informed reading of state property law. We have seen that the resolution of this question is complicated by the existence of the federal structure of our political system, and by the fact that we lack a single coherent philosophical rationale underlying the institution of private property, but instead have three distinct and often conflicting rationales. In this section, we hope to illustrate, in the context of some of the cases discussed in Part II, how these various factors interact to produce the complex and uncertain doctrines we observe in modern takings law.

The general welfare justification, as we discussed in the preceding section, is closely associated with the police power of the state. Decisions upholding police power regulations against takings challenges can generally be explained as findings that the state's interest in maximizing utility outweighs the self-expression/liberty and labor/economic justice concerns of the landowner. *Miller v. Schoene*,¹⁷⁶ the Virginia cedar rust case, offers a good example. The plaintiffs in *Miller* would appear to have a powerful self-expression argument. The red cedar trees most likely were of great personal importance to the plaintiffs. They no doubt took great pride in ownership of the red cedars and

Right and Law §41 (J.M. Sterritt Trans.), in *THE PHILOSOPHY OF HEGEL* 241 (Carl J. Friedrich ed., Random House 1954).

176. 276 U.S. 272 (1928). For a discussion of *Miller*, see *supra* notes 64-69 and accompanying text.

derived pleasure from having just that sort of tree surrounding their homes. By cutting down the trees, the state had, in a sense, invaded their private homes.¹⁷⁷ Likewise, the landowners could frame their argument in labor/economic justice terms: loss of the cedars reduced the market value of their homes, value which rightfully belonged to the plaintiffs. The Court rejected these arguments. In its view, the simple question was whether apple trees or cedar trees were more important to society: "The state does not exceed its constitutional powers by deciding on the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."¹⁷⁸

Note the role the three competing justifications play in the case. The central question is whether a statute authorizing the destruction of privately-owned cedar trees to prevent agricultural damage is reasonably consistent with background principles of Virginia property law, or whether it is instead an impermissibly abrupt departure from those principles. Because each of the three justifications is itself a part of that body of background principles, the task for the state courts, and ultimately the Supreme Court, is to decide how much weight to ascribe to each of the justifications in the context of this case. The Court favored the utility justification implicit in the police power: "Where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."¹⁷⁹

The Supreme Court of Appeals of Virginia had reached the same conclusion.¹⁸⁰ In affirming this decision, the United States Supreme Court could have been doing either or both of two things. It could have been saying (as we have just suggested) that, as a matter of Virginia property law, the Virginia court's balance of the three values was sufficiently consistent with Virginia's precedent that it did not violate the federal Takings Clause by shifting the state's property rules unexpectedly. Alternatively, the Court could have been saying that the state court decision did not violate some independent balance of values man-

177. Indeed, if a similar case were to arise today, the plaintiff would appear to have a strong argument under the "physical invasion" analysis of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 (1982).

178. *Miller*, 276 U.S. at 279.

179. *Id.* at 279-80.

180. *See id.* at 277.

dated by the federal Takings Clause, i.e., it did not violate some minimum *federal* version of the background rights to self-expression and to the fruits of one's labors. Unfortunately, the uncertain basis of the Court's decision in *Miller* would appear in many of the Court's takings cases.

In *Mahon*,¹⁸¹ the Court's definitive regulatory takings case, the Court had also chosen not to discuss the interplay between state and federal law. *Mahon* most clearly illustrates the strength of the labor/economic justice justification in takings law. In the Court's view, the state was trying to steal back, through regulation, the very same coal that its citizens had willingly sold to the coal company years before.¹⁸² The Court portrayed the state (and the state's individual citizens) as foolish sellers trying to escape a bad bargain:

The rights of the public in a street purchased or laid out by eminent domain are those it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.¹⁸³

The state might have a valid reason to want the coal, but in economic justice terms, it did not deserve the coal. The Pennsylvania Coal Company, which had shrewdly obtained waivers of the right to claim subsidence damages years before, did deserve it.

In contrast to *Miller*, the Court in *Mahon* overturned the decision of the state court.¹⁸⁴ The Pennsylvania Supreme Court apparently believed the coal company's expectation that it would receive the benefit of these reserved mineral rights was not so firmly rooted in the relevant background principles that it outweighed the state's authority to maximize utility. This belief by the Pennsylvania court would have been entirely understandable given the nearly unqualified authority of the states to regulate under the police power prior to *Mahon*. The Court disagreed, finding, in its famous phrase, that the state's regulations had

181. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

182. *See id.* at 415.

183. *Id.*

184. *See id.* at 416.

"gone too far."¹⁸⁵ Again, it was not clear, however, whether the Kohler Act went too far beyond the background principles of Pennsylvania law, or if it violated substantive notions of labor and economic justice included in the federal takings clause, or if, to some degree, it did both. Because the Court sharply changed its own doctrine—its deference to state police power regulations—and because the states saw police power regulations as unqualified by federal takings doctrines, this lack of clarity is easy to appreciate.

The Court did not explicitly discuss such issues for many years. However, its general silence in the takings area from the late 1920s through the late 1970s, and particularly its silence in takings cases arising under state law, suggests that the Court was comfortable with the notion that property was primarily a matter of state positive law. This explanation gains support from the wealth of case law that emerged from state courts in the same period.¹⁸⁶ The Court's silence also corresponds with its general withdrawal from the field of economic regulation after the era of substantive due process, reflecting its new-found (in the 1930s) policy of deference on economic matters to the legislative branches.¹⁸⁷

Two cases from this period, however, suggest that the Court still found the self-expression justifications for property to be important. The first was *United States v. Causby*,¹⁸⁸ in which the Court found that the federal government had taken the value of the plaintiff's home with airplane overflights.¹⁸⁹ The second case, *Moore v. City of East Cleveland*,¹⁹⁰ was technically not a taking case at all. *Moore* involved a zoning ordinance which allowed only members of a nuclear family to live in the same dwelling.¹⁹¹ The Court overturned the conviction of a grandmother who was living with her son and two grandsons who were cousins. The majority found the ordinance to be an infringement of the rights of association and privacy articulated in

185. See *id.* at 415.

186. See, e.g., *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); *Candlestick Properties Inc. v. San Francisco Bay Conservation and Dev. Comm'n*, 89 Cal. Rptr. 897 (1970); *Lyon Sand and Gravel Co. v. Township of Oakland*, 190 N.W.2d 354 (Mich. Ct. App. 1971); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 193 A.2d 232 (N.J. 1963).

187. See *United States v. Carolene Products*, 304 U.S. 144 (1938).

188. 328 U.S. 256 (1946).

189. *Causby*, 328 U.S. at 266-67.

190. 431 U.S. 494 (1977).

191. See *Moore*, 431 U.S. at 496.

cases such as *Pierce v. Society of Sisters*,¹⁹² *Griswold v. Connecticut*,¹⁹³ and *Roe v. Wade*.¹⁹⁴ In his concurring opinion, however, Justice Stevens saw the case as a simple land use regulation that should be analyzed under the "substantial relation" test of *Euclid* and *Nectow*.¹⁹⁵ Citing a number of state zoning cases that struck down similar ordinances, he concluded that the nuclear-family ordinance bore no substantial relation to its stated goals of reducing crowding and traffic congestion and, thus, represented a taking of property without due process or just compensation. Stevens elaborated:

since [this ordinance] cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property—it must fall under the limited standard of review of zoning decisions which this Court preserved in *Euclid* and *Nectow*.¹⁹⁶

Taken together the majority and concurring opinions in *Moore* illustrate a certain degree of overlap between the self-expression justification included in the property clauses, and the privacy interests associated with the concept of "liberty" in the Due Process Clause. When police power regulation infringes on this sort of interest, *Moore* suggests that the Court will pay less deference to a state court's balancing of the background values in state property law. This partly reflects that, while an extensive body of case law interpreting "property" exists at the state level, the doctrines interpreting "liberty" have been predominately federal.¹⁹⁷

The Court's more modern takings cases reflect the same tensions among the three lines of justification, and between state and federal law. The multi-factor analysis of *Penn Central*¹⁹⁸—another case pitting the economic justice interests of a private business against the utilitarian interests of the

192. 268 U.S. 510 (1925) (striking down state law requiring children to attend public schools).

193. 381 U.S. 479 (1965) (striking down state law banning the use of contraceptives by married persons).

194. 410 U.S. 113 (1973) (striking down state law banning abortions).

195. See *Moore*, 431 U.S. at 513-15 (Stevens, J., concurring) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)).

196. *Moore*, 431 U.S. at 520-21 (Stevens, J., concurring).

197. See Michelman, *supra* note 134, at 303-04.

198. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

state—balances these concerns against each other. In subsequent cases, the actual outcome of the balance has depended largely on the facts in each case. For example, in *Kaiser Aetna*, the Court found that the federal government took property by requiring a privately-built marina to be open to public navigation.¹⁹⁹ The Court emphasized that the plaintiffs had lost the right to exclude others from their property, one of the most basic of the standard incidents.²⁰⁰ In sharp contrast, within a year, in *Pruneyard*,²⁰¹ the Court attached much less importance to the right to exclude in the context of commercial property, agreeing with the California Supreme Court that:

It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising . . . 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center].²⁰²

Kaiser Aetna appears to reflect the self-expression justification. The loss of the right to exclude others was important to “maintain the privacy and security of the pond.”²⁰³ *Pruneyard* appears to reject the labor/economic justice line of justification. The Court found that the loss of the right to exclude had little, if any, effect on the investment value or profitability of the shopping center.²⁰⁴

In *Lucas*,²⁰⁵ the Court finally discussed explicitly the role of federalism in takings jurisprudence. The decision itself was a direct descendant of *Mahon*, holding that the state had “stolen” the economic value of the plaintiff’s lots through a regulation that rendered them worthless. Such a regulation, by nature, went too far—it violated “the historical compact recorded in the

199. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

200. *See id.* at 179-80.

201. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 78 (1980).

202. *Id.* at 78 (quoting *Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979)).

203. *Kaiser Aetna*, 444 U.S. at 168.

204. *See PruneYard*, 447 U.S. at 83. More recently, *Dolan* seemed to violate the distinction that had been drawn in *Kaiser Aetna* and *PruneYard*, by holding that the right to exclude was a crucial element of the plaintiff’s property interest in her hardware store. *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994). *Dolan* may reflect the Court’s increasing desire to fashion blanket rules that ignore the distinctions between factual contexts.

205. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992).

Takings Clause."²⁰⁶ But the Court offered the state a way out: the regulation would not be a taking if authority for it could be found in an "objectively reasonable" interpretation of South Carolina property law.²⁰⁷ This indicates that the Beachfront Management Act went too far because it departed unexpectedly from South Carolina precedent, not because it departed from substantive requirements of the Takings Clause.

Lucas, then, suggests a vision of the Takings Clause not as an independent source of substantive property law, but instead as a sort of "brake" on how quickly state courts may change the interpretation of their own property law. *Lucas* certainly implies that, when discovering takings, the focus of attention ought to be on departures from the background principles and understandings of state property law, rather than on the meaning of "property" in the Takings Clause itself. By contrast, the Court's "rough proportionality" test in *Dolan's* exaction context²⁰⁸ implies that the Court is prepared to "discover" and impose on municipalities Taking Clause standards which may be more rigorous than state background principles would have suggested. These ambiguities in the Court's jurisprudence, and the Court's apparent uncertainty about whether to respect state courts' constructions of state property law,²⁰⁹ reveal, we think, the Court's own ambivalence regarding its role under the Fifth Amendment's Taking Clause.

CONCLUSION

In conclusion, the persistent problems of takings jurisprudence, as we have tried to describe, explain, and exemplify in this essay, reflect our tradition's uncertainty regarding how to balance the conflicting background principles which express the purposes for private property rights. Moreover, the distinctive role of the positive property law of the states in defining property rights, combined with the uncertain role of the federal Takings Clause and, thus, the Supreme Court in protecting those rights will provide no practical forum for resolving these uncertainties. Takings law will, therefore, remain complex, uncertain, governed by balancing tests, and highly fact-dependent. Property owners will have to depend on the considered judgments of their

206. *Id.* at 1028.

207. *See id.* at 1032 n.18.

208. *See Dolan*, 512 U.S. at 391.

209. *See id.*

attorneys to understand their property rights, and their attorneys will be faced with difficult tasks as they attempt to offer their clients any very certain advice about the law that protects their property from government action.